

DISSEISIN AND ADVERSE POSSESSION*

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DISCLAIMER

It has already been shown how even in England prior to the Real Property Limitation Act of 1833 the change from disseisin to adverse possession had opened up the possibility of the protection of the statute to many who would not have been classed as disseisors.²³¹ The tenant *pur auter vie* who held over after the death of the *cestui que vie*, the tenant who attorned to a stranger, the mortgagor or the *cestui que trust* who repudiated the mortgagee or the trustee, the co-tenant who retained all the profits under claim of title, the claimant of an equity of redemption, would not have been classified as disseisors at least under the older law,²³² but were said to be entitled to the benefit of the statute as adverse possessors.²³³ In other cases, as in that of the feoffee who entered without livery of seisin, the shortcomings of the old disseisin were obviated by the presumption of a livery after a twenty years of possession.²³⁴ Where there was an attempt to transfer a greater interest than the tenant had, there might be either a disseisin or a disseisin at election.²³⁵ The effect of the former was to destroy the tenant's interest,²³⁶ and to set the statute of limitation operating immediately, while that of the latter was to transfer such interest as the grantor had²³⁷ and if disseisin at election was to mean what its name implied, to give the landlord a right to consider the act a disseisin and so a ground for forfeiture. But disseisin at election was supposed to work in favor of the owner and not against him, and if would have been anomalous to have given it the effect of an actual disseisin in cutting off the landlord's rights.²³⁸ The tendency of Lord Mansfield's opinion in *Taylor d. Atkyns v. Horde*²³⁹ was to give even to the tortious feoffment the effect of a disseisin at election, and to that extent to cut down the running of the statute,²⁴⁰ but the possibilities of disseisin at election had not been at

* Continued from the November and December numbers, 33 YALE LAW JOURNAL, 1-13, 141-158.

²³¹ *Supra* p. 146 *et seq.*

²³² *Ibid.*

²³³ *Supra* p. 147.

²³⁴ *Rees v. Lloyd* (1811, Exch.) Wightwick, 123. Preston, however, would have made one who had entered under a void feoffment or a void grant a disseisor. 2 *Conveyancing* (1806) 310.

²³⁵ Lightwood, *Possession*, 51.

²³⁶ Challis, *Real Property* (3d ed. 1911) 138.

²³⁷ Leake, *Property in Land* (2d ed. 1909) 41.

²³⁸ Pollock and Wright, *Possession* (1888) 89.

²³⁹ 1 Burr. 60.

²⁴⁰ Lightwood, *Possession*, 51 *et seq.*

all well worked out in England at the time of the reform legislation of 1833.

As we have seen, the effect of the Real Property Limitation Act of 1833 was to cut to a minimum the importance of the character in which the possession had been taken.²⁴¹ Even the tenant at will was to have the benefit of the statute after a year.²⁴² No such drastic changes in the law were possible by judicial action alone, but the early judges in the United States applied with a free hand the doctrine that whatever the effect of one coming in by title might have on disseisin, it did not prevent his becoming an adverse possessor. The presumption in such a case was against adverse possession, but this might be overcome by a repudiation of the title under which the possession had been taken and an adverse claim of title brought home to the other party. The new doctrine hardly had a chance to get started in England but in the United States it flourished and still continues to do so. The cases of the *cestui que trust* against his trustee, or the mortgagor against the mortgagee, and of one co-tenant against another have already been mentioned.²⁴³ It has also been applied to the case of the trustee against the *cestui que trust*, of the licensee against the licensor, of the agent against his principal, of the grantor against his grantee, of the vendee under an executory contract against his vendor, of the surviving spouse against the heirs, and of the parent against his child and to many other particular relations.²⁴⁴ Perhaps its most interesting development has occurred in the case of landlord and tenant, or, more broadly, as between the holder of a particular estate and the reversioner or remainderman.

Coke laid it down that there might be forfeiture of a particular estate by the alienation of the tenant in two ways, either by act in pais, or by matter of record.²⁴⁵ The act in pais which he had in mind was the tortious feoffment, and the matter of record, the tortious fine or recovery. The tenant might also forfeit his estate by matter of record if he claimed a greater estate than he ought, or affirmed the reversion or remainder to be in a stranger.²⁴⁶ Attornment in pais to a stranger was not sufficient to cause a forfeiture and the claim of a greater estate had to be in a court of record.²⁴⁷ Disclaimer by matter of record is still given as a ground for the forfeiture of particular estates in England,²⁴⁸ but the great development since Coke's time of the doctrine that the tenant is estopped to deny the landlord's title²⁴⁹ and the abolition of the

²⁴¹ *Supra* p. 147.

²⁴² *Supra* p. 147.

²⁴³ *Supra* p. 285.

²⁴⁴ These instances are taken from 2 Tiffany, *Real Property* (2d ed. 1920) sec. 513. See also 2 C. J. 143-168.

²⁴⁵ Coke, *Littleton*,* 251 a.

²⁴⁶ Coke, *Littleton*,* 251 b.

²⁴⁷ Coke, *Littleton*,* 252 b.

²⁴⁸ Woodfall, *Landlord and Tenant* (20th ed. 1921) 450.

²⁴⁹ Bigelow, *Estoppel* (6th ed. 1800) 490, 547.

old real actions from which his examples were taken have left little chance for its application. There is considerable law in England on disclaimer in pais by a tenant from year to year or a tenant at will,²⁵⁰ but this has been rather on the ground that it determines the will of the parties than that of forfeiture.²⁵¹

In the United States today, as in England, the occasions for forfeiture given by Coke are likely to be of infrequent application but forfeiture for acts in pais has had a development of its own. The leading case is that of *Willison v. Watkins*²⁵² in which it had been held by the lower court that the tenant and those claiming under him could not gain title by adverse possession without a relinquishment of possession and a subsequent re-entry. This was evidently under the rule that one who had come into possession rightfully with the consent of the owner could not be a disseisor. The United States Supreme Court reversed the decision on the ground that the tenant by a repudiation of his tenancy which is brought home to his landlord forfeits his tenancy and starts the statute running. The case was probably one of tenancy at will or from year to year and, if so, the repudiation by the tenant put an end to the tenancy or to his right to notice and the only real question was as to whether a change of possession was necessary to start the statute running. But the court was willing to go further than this and apply the principle to a term for years. This meant forfeiture of a term for years by an oral disclaimer of the tenancy in pais brought home to the landlord, and this has generally been accepted in the United States.²⁵³ The same principle has been applied where a termor has attorned to a stranger in pais and where he has attempted to transfer a greater interest than his own.²⁵⁴ It has been suggested that the life tenant should be treated in like fashion,²⁵⁵ but as it is generally agreed that even if such disclaimer by a life tenant be deemed a cause of forfeiture it will not set the statute of limitations running once and for all,²⁵⁶ the authority is meagre.

It is one thing to hold that these disclaimers may be a cause of forfeiture and another to hold that they start the statute of limitations running so as to affect the title. In the ordinary case of express conditions, their breach will give rise to a forfeiture if the landlord so elects but the particular estate is rendered voidable but not void by the breach, and the only effect of the statute of limitation is to cut off the landlord's right to enforce the condition.²⁵⁷ The case of the tortious feoffment

²⁵⁰ Woodfall, *Landlord and Tenant*, 451.

²⁵¹ *Doe d. Graves v. Wells* (1839, Q. B.) 10 Ad. & E. 427.

²⁵² (1830, U. S.) 3 Pet. 43.

²⁵³ 2 Tiffany, *Landlord and Tenant* (1912) 1354; 2 Tiffany, *Real Property* (2d ed. 1920) 1999.

²⁵⁴ 2 Tiffany, *Landlord and Tenant*, 1356.

²⁵⁵ See the cases cited in 2 Tiffany, *Real Property* (2d ed. 1920) 2013 note 36.

²⁵⁶ *Ibid.* and *infra* p. 289.

²⁵⁷ 2 Tiffany, *Real Property* (2d ed. 1920) 1997.

and of the other tortious conveyances was exceptional. In the earlier law they did not destroy the particular estate.²⁵⁸ It was not such an innovation as at first blush appeared, therefore, when Lord Mansfield seemed willing to hold the tortious feoffment a mere disseisin at election. To bring disseisin and disseisin at election into the American development of the doctrine of disclaimer, however, is to ignore the cause of that development which has been the application to tenancies of the widespread doctrine of adverse possession noted above, that one who has come in by title may become an adverse possessor by a repudiation of that title and a claim of title in himself brought home to the other party. That is the real significance of *Willison v. Watkins*, and despite some statements to the contrary²⁵⁹ it is believed that *Willison v. Watkins* is generally law in the United States as far as tenancies for years are concerned.²⁶⁰ The argument that the landlord may be compelled to terminate the term in order to save the reversion²⁶¹ would not seem to have very much weight. In view of the fact that he is entitled to a much more explicit notice than is ordinarily required in cases of adverse possession, his laches in not bringing an action within the statutory period from the time of receiving notice would seem much more clear cut than in the ordinary case. If it were a matter of the limitation of actions alone the running of the statute on one cause of action might well be held not to affect another cause of action, but if, as has been argued, adverse possession is really affirmative prescription, anything in reason that will keep to a minimum the occasions where land will have to be held longer than for the ordinary statutory period would seem to be highly desirable. Disabilities and future interests are serious enough impediments to the quieting of titles to be kept within as narrow bounds as is reasonably possible.

Much of the above reasoning would seem to be as applicable to the case of the life estate as to that of the term for years. Certainly it would seem that a disclaimer should be as much a cause for forfeiture in the one case as in the other. In the case of the life estate, however, we have a curious example of arrested development. That the tenant *pur auter vie* holding over after the death of the *cestui que vie* was an adverse possessor was one of the first manifestations of the new adverse possession under Lord Mansfield²⁶² and what Lord Mansfield said has been and still is followed without regard to the subsequent developments

²⁵⁸ See Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 592, 606. The destruction of the bailment for a term by an unauthorized transfer would not seem to antedate the nineteenth century.

²⁵⁹ 2 Reeves, *Real Property* (1909) 900; 1 Washburn, *Real Property* (6th ed. 1902) 468. The matter is treated as doubtful in the able note to *Smith v. Newman* (1900) 62 Kan. 318, 62 Pac. 1011, 53 L. R. A. 934, at p. 943.

²⁶⁰ See the cases cited by Tiffany, 2 *Real Property* (2d ed. 1920) 1998 and in the note, 53 L. R. A. 941 *et seq.*

²⁶¹ 2 Reeves, *Real Property* (1909) 900.

²⁶² *Supra* p. 145.

in the United States of adverse possession by disclaimer in the case of tenancies for years.²⁶³ The statute is generally treated as running from the termination of the life estate regardless of express notice to the one entitled to the next estate and regardless of claim of title on the part of the one holding over.²⁶⁴ But if the more exact notice incident to disclaimer is not to be required as it is of other tenants at sufferance it would seem at least that the claim of title ordinarily requisite for adverse possession should be required to set the statute running, and there is some authority to this effect.²⁶⁵ The rule in these cases that the statute does not commence to run until the termination of the life estate has sometimes been thought to follow from the fact that the tortious operation of conveyances has been practically non-existent in the United States, but while this does mean that the attempted transfer by the life tenant of a fee is no disseisin there would appear to be no reason in the nature of things why the transferee should not be an adverse possessor as much as if his transferor had been a tenant for years instead of a freeholder. The very great desirability of this result in minimizing the number of cases where land must be held beyond the ordinary statutory period has perhaps led the courts in Nebraska and Iowa to find a way to apply adverse possession by disclaimer to life tenancies as well as to terms for years. They have held that the reversioner or remainderman may bring his action to quiet title on a disclaimer by the tenant notwithstanding the continuance of the particular estate and that the statute will commence to run once and for all from the time that notice is brought home to him of that disclaimer.²⁶⁶ This daring bit of judicial legislation has this advantage over the rule applicable elsewhere to tenancies for years that it does not place the reversioner in the dilemma of avoiding the particular estate or losing his fee. The same action that confirms his fee confirms the particular estate.

To be distinguished from cases of disclaimer are the cases of the oral or defective grant and of the vendee who has performed the conditions of his contract necessary to entitle him to a conveyance. In both cases the possessor is in by the consent of the other party and there was difficulty in finding him a disseisor. In both cases the older law resorted to the presumption of a grant to avoid this difficulty.²⁶⁷ But in the

²⁶³ That in the case of the life estate a disclaimer will not be sufficient to start the statute running once and for all until the termination of the life estate is supported by numerous and ever increasing authorities. See the cases cited in 2 Tiffany, *Real Property* (2d ed. 1920) 2012 note 33, 2013 note 38, and the regularly recurring cases in Am. Dig., *Life Estates*, sec. 8.

²⁶⁴ See the cases cited in 2 Tiffany, *Real Property* (2d ed. 1920) 2014 note 39.

²⁶⁵ See the cases cited in *ibid.* paragraph 2.

²⁶⁶ Ballantine, *Title by Adverse Possession* (1918) 32 HARV. L. REV. 135, 146; 2 Tiffany, *Real Property* (2d ed. 1920) 2013.

²⁶⁷ For the case of the feoffment without livery see *Rees v. Lloyd* (1811, Exch.) Wightwick, 123. For the case of one entitled to a conveyance, see 1 Greenleaf, *Evidence* (Lewis's ed. 1899) 46.

first case at least there is no difficulty in finding him an adverse possessor.²⁶⁸ In fact his case would seem to be a particularly meritorious one. In the second case there is the difficulty that the vendee's claim is equitable and not legal, but he holds as owner even if only as equitable owner and it is not surprising that the courts have held his possession a sufficient title without an actual conveyance.²⁶⁹ Thus adverse possession obviates the resort to many of the old presumptions which the shortcomings of disseisin necessitated. At the present time the importance of these presumptions as a supplement to adverse possession would seem fairly negligible.²⁷⁰

NATURE OF ESTATE GAINED

The statement that Maitland made of England that every title had its source in a seisin,²⁷¹ or in other words was possessory, is by no means true of the United States. Titles in this country are likely to run back to a government grant. Notwithstanding this difference, however, no one is likely to deny that the importance of adverse possession as a source of title in the United States is very great. And in so far as it is the source of the title, the title is in general non-derivative or original. Such in general was the title by disseisin in England. For instance, the disseisor was not considered to be in under the disseisee so as to be bound by a trust subject to which the disseisee held the land even although he had notice of it. There was no privity between them.²⁷²

There is difficulty, however, in thinking of any estate less than a fee simple as non-derivative. This found expression in the rule of common law pleading that the derivation or commencement of particular estates had in general to be shown while this was not necessary of estates in fee simple.²⁷³ It also found expression in the general rule that a disseisin had to be in fee.²⁷⁴ But that it was not universally true that a non-derivative title had to be in fee is shown by the case of the life estate *pur autre vie* which might be acquired by that most typical of all methods of original acquisition, occupancy.²⁷⁵ Similarly a particular estate might be acquired by disseisin or dispossession, according to Preston, where one entered claiming a particular estate already in existence, without divesting the estate of the reversioner or remainder-

²⁶⁸ 2 Tiffany, *Real Property* (2d ed. 1920) 2009.

²⁶⁹ Such is the decided weight of authority. See 2 Tiffany, *Real Property* (2d ed. 1920) 2010; 2 C. J. 154.

²⁷⁰ See 4 Wigmore, *Evidence* (1st ed. 1905) sec. 2522.

²⁷¹ 2 Pollock and Maitland, *History of the English Law* (2d ed. 1899) 46.

²⁷² T. Cyprian Williams, *Is a Disseisor of Land Bound by Equities Incumbent on the Disseisee?* (1906) 51 SOL. JOUR. 142, 143.

²⁷³ Stephen, *Pleading* (Williston's ed. 1895) 343-344.

²⁷⁴ Tiffany, *Real Property* (2d ed. 1920) 1981.

²⁷⁵ Coke, *Littleton*,* 41 b.

man.²⁷⁶ In these cases the distinction between derivative and non-derivative titles was almost stretched to the breaking point for while the title in the sense of the method of acquisition was non-derivative, it must have been hard to say that the title acquired was a "brand-new" one.²⁷⁷ It must have been commensurate with the old estate and have had the same legal character as leasehold or freehold.²⁷⁸

A new turn to the matter was given by the Real Property Limitation Act of 1833 which expressly operated on the right as well as the remedy and provided that on the running of the statute the right of the party out of possession be extinguished.²⁷⁹ Sugden took this to mean that the statute operated by way of extinguishment in the way that the old release by the disseisee had operated so that the right ceased to exist with respect to the releasor and passed to the releasee.²⁸⁰ Accordingly he held that the statute operated as "a bar and . . . a transfer of the estate."²⁸¹ Baron Parke took the same view.²⁸² It would seem, however, that they were engrossed with the right gained rather than with the method of gaining it and others refused to give to the statute the positive effect of a conveyance. The latter view was taken by Lord Esher in *Wilkes v. Greenway*²⁸³ and by Lord Esher and his associates in *Tichborne v. Weir*²⁸⁴ and this may be said to be the prevalent view in England at the present time.²⁸⁵ It is difficult, however, to say how far the case of *Tichborne v. Weir* goes. It was the case of a lease and of one who, without a formal transfer, assumed the position of the lessee. Upon the expiration of the term he was sued on the covenant to repair and the court held that he was not liable. Bowen, L. J., however admitted that the landlord never lost his right of re-entry²⁸⁶ and Kay, L. J., that the defendant had been entitled to the possession during the remainder of the term.²⁸⁷ There is nothing to indicate that they considered the statute to have made impossible the acquisition of a particular estate under the circumstances indicated by Preston,²⁸⁸ and Light-

²⁷⁶ 2 *Conveyancing* (1806) 314 *et seq.*; 2 *Abstracts of Title* (2d ed. 1824) 293.

²⁷⁷ The expression is Sweet's. *Title by Adverse Possession* (1907) 19 JURID. REV. 67, 70.

²⁷⁸ Darby and Bosanquet, *Statute of Limitations* (2d ed. 1893) 300.

²⁷⁹ *Supra* p. 146.

²⁸⁰ This explanation of Sugden's views is given by Meredith, *A Paradox of Sugden's* (1918) 34 LAW Q. REV. 253, 259, and seems convincing.

²⁸¹ *Burroughs v. McCreight* (1844) 7 Ir. Eq. 49, 54. The various statements of Sugden to the same effect are reviewed by Meredith in the article cited *supra* note 280, and referred to by Sweet, *Title by Adverse Possession* (1907) 18 JURID. REV. 416.

²⁸² *Doe d. Jukes v. Sumner* (1845, Exch.) 14 M. & W. 39, 42.

²⁸³ (1890, C. A.) 34 SOL. JOUR. 673.

²⁸⁴ (1892, C. A.) 67 L. T. 735.

²⁸⁵ 19 Halsbury, *Laws of England* (1911) 155.

²⁸⁶ 67 L. T., at p. 737.

²⁸⁷ *Ibid.* at p. 738.

²⁸⁸ See *supra* p. 157.

wood takes this for granted.²⁸⁹ Sweet thinks that "if the adverse possessor had committed a breach of the covenants contained in the lease, and the lessor had entered under the proviso for re-entry, it is hard to believe that the court would have treated his entry as unlawful."²⁹⁰

Thus the matter stood until 1905 when in *Re Nisbet and Potts' Contract*, Farwell, J., held that one who had gained the fee under the statute was bound by equitable restrictions binding on the old owner unless he were a purchaser without notice,²⁹¹ and this was affirmed by the Court of Appeal.²⁹² There is little wonder that Sweet considered *Tichborne v. Weir* in effect overruled²⁹³ for it would seem in jurisdictions like the United States where the burden of covenants run against the fee at law,²⁹⁴ that if equitable restrictions bind the adverse possessor, covenants running at law should,²⁹⁵ and if they should in the case of the fee, why should they not in the case of the lease?²⁹⁶ The judges, however, did not profess to overrule *Tichborne v. Weir* but placed their decision on the ground that the only rights extinguished for the benefit of the adverse possessor were "those of persons who might, during the statutory period, have brought, but did not in fact bring an action to recover possession of the land."²⁹⁷ Only Farwell, J., attempted to distinguish the case from *Tichborne v. Weir*. They all followed the opinion of Sir George Jessel in *London and South Western Ry. v. Gomm*,²⁹⁸ that an equitable restriction binds the land in equity and considered it immaterial that the land might be in the hands of one not in privity with the covenantor. In their opinion it was as if the right concerned had been a legal easement except that in such a case the matter of notice would have been immaterial.

²⁸⁹ Lightwood states Preston's position as good law (*Possession*, 271, 275) at the same time that he cites *Tichborne v. Weir* with approval. *Ibid.* 273. And see his *Time Limit on Actions* (1909) 118, 119.

²⁹⁰ *Op. cit. supra* note 281, at p. 416.

²⁹¹ [1905] 1 Ch. 391.

²⁹² [1906, C. A.] 1 Ch. 386.

²⁹³ *Op. cit. supra* note 290, at p. 418.

²⁹⁴ 2 Tiffany, *Real Property* (2d ed. 1920) 1405.

²⁹⁵ As to the desirability of certain covenants running against the land even in the hands of adverse possessors see Holmes, *Common Law* (1881) 404. But see Clark, *Privity of Estate* (1922) 32 YALE LAW JOURNAL, 123, 139.

²⁹⁶ Holmes considers the covenant to repair as the chief of those covenants analogous to easements which he would make run with the land irrespective of privity (*ibid.*) but, erroneously it would seem, says that the lease could not go by disseisin. Lightwood, *Time Limit on Actions* (1909) 118, goes so far as to say that "a person who acquires a title to a leasehold interest by possession takes subject to all the incidents of the tenure other than liability under the covenants in the lease." And see *ibid.* at p. 119.

²⁹⁷ Cozens-Hardy, [1906] 1 Ch. 386, 410. See also the opinions of Collins, M. R., *ibid.* 402, of Rome, L. J., *ibid.* 407, and of Farwell, J., [1905] 1 Ch. 399.

²⁹⁸ (1882) L. R. 20 Ch. Div. 562, 581.

Whatever the theory of the statute, it is generally accepted that the adverse possessor will take subject to legal burdens such as easements, profits, rent charges, mortgages, conditions, conditional limitations²⁹⁹ unless he can "shew extinguishment by abandonment or otherwise like any other landowner."³⁰⁰ Because the statute is running against one interest it does not follow that it is running against some other interest and in the case of a contingent interest such as a conditional limitation it would seem clear that it will not run until the contingency has happened and the one entitled under the gift over has a right to the possession and at any rate until he is ascertained.³⁰¹ Probably the results in these situations would not be very different under the American law of adverse possession. It must be confessed that here the doctrine of adverse possession as affirmative prescription meets its hardest test. There is so much of the remedy in evidence and so little of absolute title that we are tempted to say that after all it is the loss of the action or the right that is the primary thing and not the acquisition of the title. Nor is this entirely answered by a resort to the common law notion of relativity of title. To say that one can gain a title by adverse possession good against B just as he may have his title adjudged good against B in an action, without in either case having a title good against the whole world, is to state the result in terms of substantive law but not to conceal how largely procedural it is. It is a salutary reminder that however much adverse possession has gained for itself a place in the substantive law of property, it bears many marks of its remedial origin and will probably continue to do so. The title gained by adverse possession in such a case, however, relative though it may be, is something more than a mere possessory title for it has upon it the stamp of the statute.

A frequent case is where the adverse possession is under claim of fee and against land divided into particular estate and remainder or reversion. It is clear that in most jurisdictions the statute not only does not commence to run against the remainderman or reversioner when it does against the particular tenant but that, cases of disclaimer aside, it does not commence to run against them until the natural termination of the particular estate.³⁰² This is hardly consistent with what was said in *Tichborne v. Weir*, for if the effect of the statute was to annihilate the interest of the person against whom the statute had run, the particular estate would be wiped out and the remainderman and reversioner would have an immediate right to possession and the statute would commence to run against them immediately.³⁰³ This has led writers like Darby and Bosanquet³⁰⁴ to apply to this situation the rule

²⁹⁹ 2 Tiffany, *Real Property* (2d ed. 1920) 1980; Sweet, *op. cit. supra* note 290.

³⁰⁰ Farwell, J., [1905] 1 Ch. 400.

³⁰¹ See Kales, *Future Interests* (2d ed. 1920) 395 as to cases involving contingent remainders.

³⁰² *Ibid.* sec. 385; Sweet, *op. cit. supra* note 290.

³⁰³ *Ibid.*

³⁰⁴ *Statute of Limitations* (2d ed. 1893) 390.

applicable where the adverse claim is directed only towards the particular estate³⁰⁵ and to hold that the adverse possessor acquires an estate commensurate in quality and duration to the successive estates into which the land was divided. This view was adopted in the Irish case of *Rankin v. McMurtry*.³⁰⁶ It is also the view of Mr. Kales, based on the American authorities.³⁰⁷ The distinction between this view and Sugden's that the statute "in effect transferred the estate to the person who had the possession"³⁰⁸ is pretty fine and Sweet argues with great conviction that Sugden's view is the only one consistent with the English statute.³⁰⁹ That the original particular estate is not destroyed is supported by Mr. Kales's opinion that contingent remainders dependent upon it are not destroyed by the running of the statute against the particular tenant.³¹⁰ The rule was *contra* in England³¹¹ but Mr. Kales thinks it would be otherwise in the United States and this is believed to be so although it is hard to support unless one believes that the new particular estate that the adverse possessor has gained is the same one that originally supported the remainder.

The difficulty with Sugden's view is that in the ordinary case nothing

³⁰⁵ *Supra* p. 142.

³⁰⁶ (1889) 24 L. R. Ir. 290. See also Lightwood, *Time Limit of Actions* (1909) 119, where he definitely abandons the view expressed in his earlier work on *Possession*, 274.

³⁰⁷ *Future Interests* (2d ed. 1920) secs. 386 and 396. But see 2 Tiffany, *Real Property* (2d ed. 1920) 1982.

³⁰⁸ *Tuthill v. Rogers* (1844, Ir. Ch.) 1 Jones & La. T. 36, 72.

³⁰⁹ *Op. cit. supra* note 290, at p. 416. Sugden does not seem to have been called on to express an opinion as to the succession to limited estates under the statute but there, if anywhere, would his views seem applicable.

³¹⁰ *Future Interests* (2d ed. 1920) sec. 396.

³¹¹ Kales cites Fearn, *Contingent Remainders* (9th ed. 1831) 287 and Butler's note thereto for the well-settled rule of the old common law that a right of entry would support a contingent remainder but that a right of action would not. Fearn's explanation (p. 286) was that "whilst a right of entry remains there can be no doubt but the same estate continues; since the right of entry can exist only in consequence of the subsistence of the estate." This was an example of the old notion that the right of entry was possessory while the right of action was not. See Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 592, at p. 614. It would have been logical, as Kales argues, for them to have held that with the destruction of the right of entry the remainderman would have been entitled to possession but as the right of action still continued in the true tenant notwithstanding the loss of his right of entry it is doubtful whether any such result would have been held to follow. If the effect of the English statute of 1833 be entirely negative and such as to destroy the right of the life tenant, the right of the remainderman to enter would seem indubitable (see [1890] 34 SOL. JOUR. 691), but as to this, Lightwood in his earlier work, *Possession*, at p. 213, admitted that "probably it would not be deemed to have determined for all purposes, but to be in effect transferred to the stranger in whose favor time has been running. In other words, he gains a possessory estate *pur autre vie*." In his *Time Limit of Actions* (1909) 58, he reaches a like result as to the non-acceleration of remainders but avoids the admission that there is in such a case in effect a transfer of the life estate.

is more sharply contrasted than a conveyance on the one hand and disseisin, the statute of limitations, and adverse possession on the other. The typical example of a lack of privity of estate, whether in a case of tacking, or of liability on covenants, or of liability as a trustee has been that of disseisin, and the case of the adverse possessor before the statute has run would seem to be in the ordinary case analogous in this respect. Should the fact that the statute has run make any difference? Ordinarily it would seem not, for though, as has been argued, American adverse possession is primarily affirmative, as a method of acquisition it would seem primarily original. But if in the situation that we have been examining the remainders are not to be accelerated nor the contingent remainders destroyed, the new life estate gained has so many characteristics of the old that it is hard to express this in any other way than Sugden did in general, that in such a case there is in effect a transfer.

A less frequent but by no means unimportant case is where wrongful possession is held for the whole or part of the statutory period by one who claims a limited estate not previously existing. Here two situations may arise. Either the claim implies the existence of a fee inconsistent with the lawful fee or there is no such implication, as in the case of the void lease. The latter case will be considered presently. There are many possible variations of the former.

There may be an adverse possession initiated by A and a deed or a will by A transferring the property to B for life, either with or without a remainder to C in fee. Or A may die intestate and his wife enter a part of the land as dowress for life. Or A may not have been an adverse possessor but the possessor of a limited interest which terminated with his death or he may have had neither possession nor right. Or again, A may have been the owner and the deed or will invalid or the description of the property insufficient. Such defect may also have existed in the preceding cases where A did not have good title.

In these cases there is little difficulty in England with regard to the old owner. The character in which or the intent with which the land is held is of little importance in determining whether the statute has run against him. If the wrongful possession of the particular tenant has existed for the statutory period, barring future interests and disabilities, his rights are cut off and if such possession has been for less than the statutory period, it may be tacked with any other wrongful possession provided there has not been a gap between them.³¹²

In the United States, however, the matter of the old owner's rights is not so simple. Though the claimant to the particular estate has been in possession for the statutory period, the law will not give him a greater estate than he claims³¹³ and such an estate would not cut off the

³¹² *Supra* pp. 156-158.

³¹³ *Supra* p. 156.

old fee, while if he has been in possession for a shorter period, there is the additional difficulty of tacking his possession under the claim of a particular estate to that of his predecessor, or successor, or both, under claim of a fee.³¹⁴

But just as in the ordinary case, the particular tenant represents the fee, so for purposes of adverse possession it would seem he should represent the fee which his claim implies. Such representation is not based on the relationship of landlord and tenant, or even that of tenure, for there is no tenure between the life tenant and the remainderman, but it is based on the integrity of the fee³¹⁵ and this integrity should apply to the fee implied in the tenant's claim as well as any other. If this be so, then the claim of the particular tenant represents the claim of the fee during the tenancy and there is no break in the claim of title, and we have possession under the same claim of title for the statutory period, which would seem to be an ample compliance with the requirement of privity of estate in tacking.³¹⁶ This representation of the fee would not seem to be affected by the validity of the instrument under which the particular estate is claimed nor by the fact that the land is not properly described.

Where the completion of the statutory period is by the remainderman in fee the question of giving a man a greater estate than he claims does not arise. It is generally agreed in the United States in such a case that he can tack the possession of the particular tenant to his own, or that in other words the possession of the tenant enures to the benefit of the remainderman.³¹⁷ And there would seem to be no difference in principle in such a case whether the adverse possession had been initiated by the particular tenant or the one under whom he claimed to hold.

Where the adverse possessor initiates and completes the adverse holding the matter is more difficult, but it would seem that he represents the fee implied in his claim as much as in the other cases and that here too his possession should enure to the benefit of the remainderman, for although there has been no act on the part of the remainderman showing his acceptance of the fee as in the preceding cases there is not the difficulty of presuming a wrong on his part as in the case of disseisin as, if the reasoning of the foregoing pages has been correct, adverse possession is in the nature of a positive title and the general presumption of acceptance of property as under a deed or descent would apply.

³¹⁴ *Supra* p. 7.

³¹⁵ As to the integrity of the fee in a situation somewhat analogous, Littleton says: "For to this intent the tenant for term of life and he in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made to him. . . ." *Tenures*, *471.

³¹⁷ See *supra* p. 4.

³¹⁷ 2 Tiffany, *Real Property* (2d ed. 1920) 1970.

And such have been the decisions in the United States.³¹⁸ It is submitted that they are correct.³¹⁹

In England this question came up not between the *de jure* owner and the claimants under the adverse possession, for there there was no question but that the old owners' rights were gone, but between the particular tenant or rather those claiming under him and the remainderman. This was putting the doctrine of representation to its most acid test in the situation most unfavorable for it, and yet the logical consequences of that doctrine were approved by judges such as Martin and Pollock³²⁰ and Blackburn and Mellor and Quain³²¹ and Lindley³²² in England, and by others in Ireland and Canada,³²³ likewise by Lightwood.³²⁴ Unfortunately, in this connection Blackburn, J., used the analogy of the estoppel between landlord and tenant³²⁵ and the great powers of Sir George Jessel were called into play³²⁶ to deny that these estoppels should be carried further than where the defect in the adverse possessor's title was due to a defect in his grantor's title. If the fault lay in the incapacity of the grantor, or the failure to include the land in the instrument, or if for any other reason than the defect in his own title the instrument was not sufficient to give good title to the land in question, Sir George Jessel held that the principle of contractual estoppel was inapplicable. Lindley, L. J., seemed to agree with Sir George Jessel in this matter of estoppel³²⁷ but was not satisfied with the distinction drawn by Malins, V. C., in *Paine v. Jones*³²⁸ "between cases of persons having no title under a will because it does not purport to include the lands they claim although they believe that it does, and per-

³¹⁸ *Hanson v. Johnson* (1883) 62 Md. 25; *Anderson v. Rhodus* (1860, S. C.) 12 Rich. Eq. 104; *Brown v. Brown* (1884) 82 Tenn. 253; *Reynolds v. Trowick* (1918) 201 Ala. 449, 78 So. 827. And see the note to *Charles v. Pickens* (1908) 214 Mo. 212, 112 S. W. 551, 24 L. R. A. (N. S.) 1055.

³¹⁹ But see Ballantine, *Claim of Title in Adverse Possession* (1919) 29 YALE LAW JOURNAL, 224-235; 2 Tiffany, *Real Property* (2d ed. 1920) 1984-1986.

³²⁰ In *Anstee v. Nelms* (1856, Exch.) 1 H. & N. 225.

³²¹ In *Board v. Board* (1882) L. R. 9 Q. B. Div. 48. Blackburn, J. thought that what Martin, B., had said in *Anstee v. Nelms* was "good sense and good law" and the language of the other two judges indicated an equally broad doctrine. The case was not one where the adverse possession was initiated by the creator of the life estate for he was tenant by the curtesy so that no interest passed under his will, but the will was a valid will and there was a sufficient description of the property.

³²² *Dalton v. Fitzgerald* [1897, C. A.] 2 Ch. 86, 90.

³²³ See Ballantine, *op. cit. supra* note 319, at p. 226.

³²⁴ *Possession*, 284. In his later work (*Time Limit of Actions* [1909] 129) however, Lightwood admits that the distinction made by Malins, V. C., in *Paine v. Jones* (1874) L. R. 18 Eq. 320, discussed *infra* p. 298, "must at present be taken to be established by authority."

³²⁵ *Board v. Board*, *supra* note 321, at p. 53.

³²⁶ *In re Stringer's Estate* (1877) L. R. 6 Ch. Div. 1, 9.

³²⁷ *Dalton v. Fitzgerald*, *supra* note 322, at p. 91.

³²⁸ *Supra* note 324.

sons claiming under a will which purports to deal with land to which the testator had no title although they thought he had."³²⁹ How far the distinction drawn by Malins, V. C., in *Paine v. Jones* is destined to survive in England is a matter for the future to determine.³³⁰ It is not believed that it is likely to have much effect in the United States, for though estoppel has been mentioned by some of the American judges the solid ground for their opinions has been representation, and it matters little that what they have said on estoppel may not meet with approval.³³¹

There remains the case of the one holding for the statutory period under a void lease. If, as seems generally agreed, a particular estate can be gained by adverse possession where such an estate is already in existence and is claimed by the adverse possessor,³³² and if, as has just been shown, an entirely original particular estate can be created by adverse possession, where the particular tenant represents the fee claimed, why should the courts not go one step further and hold that where one enters under color of a lease and holds for the statutory period he gains a lease commensurate with the one claimed? It is believed that the Mississippi cases which so hold³³³ will and should have an extensive following. It would seem to be the logical consequence of the repudiation of the doctrine that a wrongdoer shall not qualify his own wrong.³³⁴

INCHOATE TITLE

It is not the purpose here to go into the analysis of ownership and possession. They were quite distinct in the Roman law,³³⁵ they were quite distinct to Bracton,³³⁶ they are constantly contrasted in the utter-

³²⁹ *Dalton v. Fitzgerald* *supra* note 322, at p. 91.

³³⁰ *In re Anderson* [1905] 2 Ch. 70, was not a case where there was a defect in the divisor's title nor an inadequate description but the case of a void will, and Buckley, J., followed *Paine v. Jones* on the ground that while the authority of that case was considerably shaken by the opinion of Lord Lindley, he did not think the latter intended to throw doubt on a case of this kind. *In re Tennent's Estate* [1913, Ir. Ch.] 1 Ir. 280 was similar to *In re Anderson* and a like result reached.

³³¹ It is urged by Professor Ballantine that the English distinction be adopted in the United States, not on the ground of estoppel but on the ground of a common source of title (*op. cit. supra* note 319, at pp. 224, 225, 235) but he would deny the enurement of the particular tenant's possession to the benefit of the remainderman even in a case like *Dalton v. Fitzgerald* (*ibid.* at p. 232). His emphasis on the adverse possession or at least the possession of the grantor would seem a relic of the time when possession was necessary to a transfer.

³³² *Supra* p. 293.

³³³ See *supra* p. 158.

³³⁴ *Ibid.*

³³⁵ See Ulpian's statement *Nihil commune habet possessio cum proprietate*, Dig. 41. 2. 12. 1.

³³⁶ Fol. 113. Bracton adopts Ulpian's statement as his own. See Maitland, *The Mystery of Seisin* (1886) 2 LAW Q. REV. 481 and 2 Pollock and Maitland, *History of the English Law* (2d ed. 1899) 78.

ances of the courts, in the works of jurists and in the everyday life of the lawyer and the layman. Possession on the one hand and proprietary right on the other represent two very distinct ideas. But as it happened, the remedies of the common law that emphasized proprietary right sunk into the background,³³⁷ the writs of entry came to be considered possessory,³³⁸ and finally in the action of ejectment, the record of the case showed nothing of the real merits of the case and the failure to succeed with one action by no means precluded one from beginning another. Where one succeeded, as where one entered on the land provided his entry was lawful, he was in as of his lawful estate but that he had such lawful estate was not *res adjudicata* even between the parties.³³⁹ What strikes us with wonder is that this rough and ready remedy should have been as satisfactory as it was, but it is no more surprising than that such an intense protection of property in chattels as was and still is given by the common law could have been effected by means of an action for damages³⁴⁰ or that a most effective system of property law could have been developed in equity through a remedy that acted immediately only on the person. In the reaction against natural law and natural rights there was a tendency in the last century to exalt the remedy and to see the law in terms of the remedy rather than to see through the remedy to the more fundamental thing beyond. Thus the right of the *cestui* was viewed in the light of a personal obligation and one who had lost his chattel was said to have a mere right to damages. In the case of land it was said that the law knew no such thing as ownership, but knew a mere right of possession. And yet it was the looking at the more fundamental thing behind that was the cause of the development of our law, the notion that where there was a right there should be a remedy, although this was often in the guise of fictions that obscured the real process. Of no part of the law was this more true, it is believed, than of the law of possession and proprietary right.

Possession probably held the field during the Middle Ages under the name of seisin, although this was only by means of stretching the conception of seisin to the breaking point,³⁴¹ but equity came to the aid of proprietary right and finally the Statute of Uses turned the scale in favor of proprietary right, although only on the condition that it should masquerade as seisin.³⁴² Seisin thus became a *tertium quid*, a mystery,³⁴³ and the disseisor a sort of owner for the time being. In time his

³³⁷ The Writs of Right had seen their best days in the time of Edward I. Maitland, 2 Pollock and Maitland, *op. cit. supra* note 336, at p. 71.

³³⁸ *Ibid.* at p. 72.

³³⁹ Sedgwick and Wait, *Trial of Title to Land* (2d ed. 1886) sec. 42.

³⁴⁰ See 2 Pollock and Maitland, *op. cit. supra* note 336, at p. 154.

³⁴¹ Bordwell, *Seisin and Disseisin* (1921) 34 HARV. L. REV. 592, 593.

³⁴² *Ibid.* at p. 598.

³⁴³ Maitland, *Mystery of Seisin* (1886) 2 LAW Q. REV. 481; Sweet, *Title by Adverse Possession* (1907) 19 JURID. REV. 66.

seisin might become indefeasible but this was the best the old law could offer him. The reform legislation of 1833 eliminated disseisin from the law of actions, but although Sugden and Baron Parke attempted to give it the positive effect of a conveyance, it was negative in its language and the prevalent view of its effect at the present time seems to be that for an indefeasible seisin it has substituted an indefeasible possession.³⁴⁴ This view Ames adopted as applicable generally.³⁴⁵ Despite this and the currency that Blackstone might have been expected to give to such a view, it would seem to have had little place in the United States.

Entry and ouster ceased to be principal facts in the English law with the passage of the Statute of Uses and the development of ejectment.³⁴⁶ Possession came to follow the right rather than the right the possession,³⁴⁷ and this was carried to its logical conclusion in the United States by holding that the owner had possession unless the land was in the adverse possession of another.³⁴⁸ This had long before been the rule for chattels in England.³⁴⁹ And when there was a break in the adverse possession the American courts held that the possession derived from ownership reasserted itself without entry.³⁵⁰ On the adoption of this view in England³⁵¹ Lightwood was frank to recognize its significance as substituting ownership and possession for the old seisin.³⁵²

The feeling, often unconscious, of the fundamental difference between possession and even adverse possession on the one hand and proprietary right or ownership on the other is illustrated by the statement sometimes made that the title gained by adverse possession relates back to the beginning of the adverse possession.³⁵³ This is not disseisin, for the disseisor's title such as it exists from the beginning and the only effect of the statute is to make it indefeasible. It is an analogy drawn from the law of conversion and it is only where there is a sharp distinction between possession and proprietary right as there is in the case of chattels, that there can be any place for such relation. It matters not for the purpose of this illustration that the theory of the title relating back would seem to have no place in the law of adverse posses-

³⁴⁴ 19 Halsbury, *Law of England* (1911) 155 and see the statement of Lord Macnaghten, *Perry v. Clissold* [1907, P. C.] A. C. 72, 79.

³⁴⁵ 3 *Select Essays*, 567-578.

³⁴⁶ Bordwell, *op. cit. supra* note 341, at p. 601.

³⁴⁷ *Ibid.* 604.

³⁴⁸ *Supra* p. 10.

³⁴⁹ *Hudson v. Hudson* (1628, K. B.) Latch, 214, 263; Bordwell, *Property in Chattels* (1916) 29 HARV. L. REV. 501, 515.

³⁵⁰ *Supra* p. 2.

³⁵¹ *Supra* p. 3.

³⁵² *Possession*, 63.

³⁵³ Ballantine, *Title by Adverse Possession* (1919) 32 HARV. L. REV. 135, 142; Kales, *Future Interests* (2d ed. 1920) sec. 392; 2 C. J. 254.

sion.³⁵⁴ There is no such theory of election in adverse possession as there is in conversion to call the fiction into play and even in the case of conversion it would seem extremely artificial.³⁵⁵ There would seem to be no call for its extension.

Finally the extended treatment of adverse possession in the modern American texts is a standing answer to the adequacy of any theory of possession plus the statutes of limitation to explain the American law. If Sugden's view of the English statute operating as a conveyance is not to be accepted in England, some such view as that of defeasible possession must take its place. But there is no such necessity in the United States for, as has been argued in these pages, we have a doctrine of affirmative prescription and much of the criticism of our law has resulted from failing to recognize that fact, but instead of insisting on applying to our law the criteria of the negative prescription of the English law. Which is the better system may be matter of argument. The English has many advantages in cutting off stale claims. Ours is more logical from the point of view of quieting titles. But whether we prefer the one system or the other, it will tend to enlighten rather than to confuse, to have a clear understanding of what the two systems are.

CONCLUSION

The theory that we adopted such of the English common law as was suited to our condition has often in practice been taken to mean that we adopted such of the English law as we did not definitely reject. It is assumed that all sorts of English rules are part of our law although the only authority for them are the English cases and in many instances very old English cases at that. Law that does not find its way into the cases over a long period of time and in our many jurisdictions, however, cannot be very live law and one of the crying needs of our times is to determine what is live law and what is not. But where we have definitely rejected the old law and substituted something different and perhaps better in its place, it would seem to be lacking in proper pride to ignore it and go on judging the living present by the discarded past. Perhaps this has not been the case in other branches of the law to the same extent that it has been true in the law of adverse possession, but it will not do to assume this and it is believed that in other branches of the law as well constructive legal work of the greatest value has been done by the American judiciary. The harvest truly is plenteous but the laborers are few.

³⁵⁴ See *La Salle Coal Co. v. Sanitary District* (1913) 260 Ill. 423, 430, 130 N. E. 175, 177.

³⁵⁵ In *Miller v. Hyde* (1894) 161 Mass. 472, 481, 37 N. E. 760, 763, Holmes, J., refers to "the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion."